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The Applicability of Doctrine of Res Ipsa Loquitur to Cases Involving Bursting Bottles

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NOTES

THE APPLICABILITY OF THE DOCTRINE OF RES IPSA LOQUITUR TO CASES INVOLVING BURSTING BOTTLES

I. The Scope of the Problem

A. INTRODUCTION.

The past few decades have seen the rise of considerable litigation concerning injuries to persons resulting from bursting or exploding bottles. Almost without exception the bottle which bursts is one which contains some form of carbonated beverage. In order to recover from the manufacturer, a person so injured is confronted with a serious proof problem. A warranty by the manufacturer is generally not implied in law in this type of case. In most instances plaintiff cannot recover in contract, since there is ordinarily no privity between plaintiff and defendant. Plaintiff's only hope for recovery, then, lies in an action for negligence. It is here that the difficulty arises. The reason is quite simple. Normally, when a prospective plaintiff purchases a bottle containing a carbonated beverage, the manufacturer has nothing to do with the transaction, nor do any of his agents. In most cases the prospective defendant has transferred the bottle to another party, who in turn has transferred it to the plaintiff. Usually considerable time has elapsed. The bottle then explodes, and the plaintiff is injured. But at the precise moment of the injury, the defendant was not on the scene, nor did defendant commit any specific act of negligence at the time of, or just prior to, the explosion. The defendant will be liable only if the plaintiff can show negligence on the part of the defendant, and since the plaintiff can show no negligence at the time of the injury, he must show some former negligent act which was the cause of the subsequent injury. Here again, however, the plaintiff will have difficulties. If there was any negligent act on the part of the bottling company, that negligent act was committed while the bottle was under the exclusive control of the bottler. No bottling company is anxious to incur liability and it generally comes into court fortified with expert testimony tending to show that its methods are those generally used throughout the trade, that they ex-

emplify the use of reasonable care, and that it is scientifically inconceivable that one of its bottles could explode in the absence of a negligent act of the plaintiff or of some third party.

Since the plaintiff is ordinarily unable to prove a specific negligent act, he can recover only if some special doctrine is available to him. The doctrine which he invokes is that of res ipsa loquitur. In order to place the problem presented here in its proper perspective, a brief general discussion of that doctrine is essential.

B. RES IPSA LOQUITUR EXPLAINED.

Res ipsa loquitur is merely one type of circumstantial evidence, which, in turn, is evidence of a fact, or set of facts, from which the existence of another fact (the fact to be proved) may reasonably be inferred. Dean Prosser points out that[1]

> The statement of this doctrine most often quoted is that of Chief Justice Erle in 1865:[2]
>
> 'There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, if affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.'[3]

From a careful examination of the above definition of the res ipsa doctrine, at least three prerequisites to its application become evident:

1. An accident which is peculiar in its nature, so that it would not normally occur in the absence of negligence.
2. Exclusive control by the defendant.
3. Absence of control by the plaintiff.[4]

Some courts add a fourth prerequisite, namely, that evidence as to the true explanation of the accident must be more accessible to the defendant than to the plaintiff.[5]

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1. PROSSER, HANDBOOK OF THE LAW OF TORTS 293 (1941).
2. Scott v. London and St. Katherine Docks Co., 3 H. & C. 596, 159 Eng. Rep. 665 (1865).
3. *Ibid.*
4. PROSSER, *op. cit. supra* note 1, at 291.
5. This requisite to the application of the res ipsa doctrine has not been applied by the majority of courts. Wigmore seems to favor its presence as a condition precedent to an application of res ipsa:

> It may be added that the peculiar force and justice of the rule (Res Ipsa Loquitur) . . . consists in the circumstance that the chief evidence

1. Peculiar Nature of the Accident.

The requisite that the accident must be one which would not ordinarily happen without negligence is, of course, only another way of stating a rule of circumstantial evidence, that is, that the accident in itself gives rise to an inference of negligence. Many accidents occur where no one is at fault. To these res ipsa will not apply. On the other hand, some accidents "bespeak negligence," and to these res ipsa will be applicable. Prosser relates a rather humorous example:[6]

> We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless.[7]

It is important to test the particular facts of each accident in determining whether res ipsa should be applied. The above quotation gives an obvious example of proper application of the doctrine. Other cases are not so clear. All that is necessary is that a reasonable man could say that it is more likely than not that the accident was caused by negligence.

2. Exclusive Control By the Defendant.

The purpose of this requisite to the application of res ipsa is ". . . to focus the inference of negligence upon the defendant."[8] An application of res ipsa gives rise to an inference of negli-

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> of the true cause . . . is practically accessible to him (defendant) but inaccessible to the injured person (plaintiff). [9 WIGMORE, EVIDENCE § 2509 (3d. ed. 1940)]

Prosser, on the other hand, severely criticises the use of this requisite to an application of res ipsa:

> It is difficult to regard this factor as anything more than a make-weight, or to believe that it ever can be controlling. If the circumstances are such as to create a reasonable inference of negligence, it cannot be supposed that the inference ever would be defeated by a showing that the defendant knew nothing about what had happened; and if the facts give rise to no such inference, a plaintiff who has the burden of proof in the first instance could scarcely make out a case merely by proving that he knew less about the matter than his adversary.
>
> [PROSSER, HANDBOOK OF THE LAW OF TORTS 301 (1941)]

It would seem that Prosser's view is the more convincing. The fact that defendant knows more about the causative factors in a res ipso case might well be said to have been more a reason for a development of the doctrine; but the presence, or absence of this factor should never determine finally the rights of the parties with respect to the applicability of the res ipsa doctrine.

6. Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918).
7. *Id.* at 500, 78 So. at 366.
8. PROSSER, *op. cit. supra* note 1, at 298.

gence. However, to result in liability, the facts must point to the defendant as the negligent party. If the defendant has control over the instrumentality causing the accident (the bottle in reference to this discussion), the inference of negligence may be more certainly fixed upon him. However, the use of the word "control" here may effect ambiguity. Courts often confuse the issue as to whether the requirement is that the defendant be in control of the instrumentality at the time of the injury, or at the time the negligent act which brought about the injury was committed. It is especially important in discussing the bursting bottle cases that this ambiguity be eliminated, since at the time of the accident the bottle is nearly always in the control of the plaintiff. In applying res ipsa, it is sufficient, or should be, that the defendant have the control *at the time the negligence occurred.*[9] If the defendant has control of all the factors which have apparently caused the accident, whether he has actual possession and control at the time of the accident is immaterial, and this second requisite is fulfilled.[10]

3. Absence of Control By the Plaintiff.

This requirement is, of course, the mere converse of the previous one. Its reason for existence is to eliminate the possibility that the plaintiff may have been responsible for the accident. Obviously this requisite is not to be interpreted rigidly. In many cases the plaintiff will be doing some act in connection with the instrumentality causing the accident. In the bursting bottle cases the plaintiff will usually have possession of the bottle. But no difficulty will arise in interpreting this condition if it is remembered that the plaintiff need only prove himself free from negligence when the accident occurs, even though he may be in possession and control of the bottle.[11]

4. Evidence More Readily Accessible to the Defendant Than to the Plaintiff.

A few courts have said that a plaintiff seeking the benefit of the res ipsa doctrine must show that evidence of the true cause of the accident must be more readily accessible to defendant

9. *Ibid.*
10 *Ibid.*
11. *Id.* at 300.

than to plaintiff. This doctrine has been severely criticised by some who say that, if the other requisites are met, and an inference of negligence arises, it should not matter to whom the evidence is available. However, the courts often speak of this requisite, and some courts demand its presence as a condition precedent to the application of the doctrine.[12]

C. THE PROCEDURAL EFFECT OF RES IPSA LOQUITUR.

Most courts regard an application of res ipsa loquitur as nothing more than a form of circumstantial evidence which creates an inference of negligence. It is important to remember that the jury is not compelled, in most cases, to accept the inference, *i.e.*, the inference is permissive and not mandatory. A few courts, on the other hand, treat the res ipsa loquitur doctrine as one which raises a rebuttable presumption of negligence. A New Jersey court[13] has ably explained the res ipsa loquitur doctrine:

> That the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they [the facts] call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur where it applies does not convert the defendant's issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.[14]

An application of the res ipsa doctrine should *not* shift either the burden of producing evidence or the burden of persuasion to the defendant. The plaintiff must still show, by a preponderance of the evidence, that the defendant was negligent. The plaintiff is merely entitled to an instruction to the jury that it may, if it so chooses, infer from the fact of the accident that the defendant was negligent, even though plaintiff has introduced no evidence of specific acts of negligence.

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12. See note 5 *supra*.
13. Markowitz v. Liebert & Obert, 23 N.J. Misc. 281, 43A.2d 794 (Sup. Ct. 1945).
14. *Id.* at 284, 43 A.2d at 797.

We may now consider the applicability of the doctrine in connection with cases involving injury as a result of the bursting or exploding of a bottle.

II. General Inapplicability of the Doctrine in Cases of Bursting Bottles

There is much diversity of opinion as to just what the plaintiff need show to be entitled to the court's application of res ipsa loquitur. As was mentioned, the applicability of the doctrine depends upon the facts peculiar to each case. This rule is especially important here.

In general, a mere showing that a bottle burst, and that the plaintiff was injured thereby, will not merit an application of the doctrine. Almost without exception the courts require a plaintiff to show more. The balance of this note will be devoted to a discussion of what further facts must be shown.

III. The Requisites of Res Ipsa Loquitur as Applied to Bursting Bottle Cases

While the main divisions herein used are doctrinal, the internal grouping of cases within those divisions is factual. The doctrinal divisions correspond to the general requisites for the application of the doctrine.

A. Nature of the Accident; an Accident Ordinarily the Result of Negligence.

In general, the courts are in agreement that the explosion of a bottle containing an ordinarily harmless beverage is an accident which would normally not happen without negligence on the part of someone. In *Payne v. Rome Coca-Cola Bottling Co.*,[15] defendant had relinquished control over a bottle, and it later exploded, injuring the plaintiff. Plaintiff offered proof of the absence of negligence on his part as well as on the part of all others who handled the bottle except the defendant; however, plaintiff offered no proof of specific acts of negligence by the defendant. The Georgia Court of Appeals, in reversing the trial court's order granting a non-suit, declared:

> If the plaintiff can recover at all, he can do so only upon an application of the maxim 'res ipsa loquitur.' *The occurrence*

15. 10 Ga. App. 762, 73 S.E. 1087 (1912).

> *was unusual. Bottles filled with a harmless beverage do not ordinarily explode.* When they do, an inference of negligence somewhere and in somebody may arise. There is no presumption of law, but merely an inference of fact. [Italics added].[16]

A similar position has been taken by the Supreme Court of Arkansas:[17]

> . . . a sound bottle of carbonated water, or other charged liquid prepared for human consumption would not ordinarily burst if carefully handled. If such a bottle containing liquid under pressure does explode . . ., it is probable that the bottler charged it excessively, failed to discover a flaw in the bottle or cap, or was otherwise negligent in preparing it.[18]

It is especially important to remember that the accident need only be such that would not ordinarily happen in the absence of negligence.[19] It is *not* necessary that the possibility of unavoidable accident be ruled out completely. Such a requirement would be unrealistic, because it could never be met.

B. AND C. EXCLUSIVE CONTROL BY THE DEFENDANT AND ABSENCE OF CONTROL BY THE PLAINTIFF.

Since these two requisites are each the converse of the other, they will be discussed together. The following factual categorization seems appropriate:

1. Cases where the exploding bottle was in the exclusive management and control of the defendant at the time of the accident.
2. Cases where the bottle was out of the management and control of the defendant, but where neither the plaintiff nor anyone else had done anything to cause the accident, and the plaintiff so shows.
3. Cases where the bottle was out of the defendant's control, but where plaintiff makes no affirmative showing that neither he nor anyone else besides defendant has mishandled it.
4. Cases where the bottle was out of the defendant's control, and where there is evidence tending to show a negligent mishandling of the bottle by the plaintiff or by someone else besides the defendant.

16. *Id.* at 763, 73 S.E. at 1087.
17. Coca-Cola Bottling Co. of Fort Smith, Ark. v. Hicks, 215 Ark. 803, 223 S.W.2d 762 (1949).
18. *Id.* at 806, 223 S.W.2d at 764.
19. Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497 (1925).

1. There are few cases of bottles exploding or bursting and causing injury to a plaintiff where the defendant manufacturer is in absolutely exclusive control of the bottle. However, it is safe to say that res ipsa loquitur applies in such a case. In *Riecke v. Anheuser-Busch Brewing Association,*[20] plaintiff was injured and permanently scarred when a bottle of defendant's beer exploded. Plaintiff, upon invitation of the defendant, was making a tour of inspection of defendant's plant. The St. Louis Court of Appeals held the following instruction to the jury to be correct:

> The jury were instructed that, if they believed from the evidence that, whilst plaintiff was in the plant, a bottle filled with liquid, which was being handled by one of defendant's servants exploded and a piece of glass struck and injured plaintiff, and that the contents of said bottle were manufactured and placed in said bottle by defendant, the law presumes that the explosion of the bottle and the consequent injury to plaintiff was caused by defendant's negligence, and that the verdict should be for plaintiff, unless the jury should find that, notwithstanding this presumption, said explosion and injury to plaintiff was not caused by negligence on the part of defendant.[21]

In the *Riecke* case the plaintiff merely attempted to prove general negligence on the part of the defendant by showing the facts of the accident and the injury; no evidence of specific negligence was offered. The court applied the res ipsa doctrine, and the plaintiff recovered. The same reasoning and result are found in *Markowitz v. Liebert and Obert,*[22] where plaintiff was leaning over to pick up a case of defendant's beer, at defendant's plant, and a bottle exploded. In these cases the courts find that the accident suggests negligence, and since defendant is in full control of the bottle at the time of the accident, such negligence is easily focused upon him.

2. Where the defendant has released his control over the bottle which exploded, but where the plaintiff shows that he, the plaintiff, has not done anything to cause the explosion and that no one else has, the majority of the courts give the plaintiff the benefit of the res ipsa doctrine. Such cases may be divided into two groups: (a) those where the bottle has just recently been

20. 206 Mo. App. 246, 227 S.W. 631 (1921).
21. *Id.* at 248, 227 S.W. at 632.
22. 23 N.J. Misc. 281, 43 A.2d 794 (Sup. Ct. 1945).

released from defendant's control, and no one has handled it since, and it explodes; (b) those (cases) where the defendant has relinquished control prior to the explosion, where plaintiff or others have handled the bottle, but where the plaintiff affirmatively shows that no one has *mishandled* it after defendant relinquished control and before the explosion.

(a) In *Brunskill v. Farabi*,[23] defendant's servant, while acting within the scope of his employment, delivered a case of Pepsi-Cola to plaintiff's shop, and placed it under a counter. Later, no one else having touched the bottles, one blew up and injured plaintiff as she was bending over to remove bottles from the case. Plaintiff brought suit, introduced as evidence the facts of the accident, but offered no proof of specific acts of negligence by defendant, thus relying wholly upon the res ipsa doctrine. The court, holding for the plaintiff, stated that the trial court properly instructed the jury that "such facts, if you find them to be true, are sufficient circumstantial evidence to warrant a finding by you that the explosion, if any, . . . was caused by the defendant's negligence."[24] So also, in *Bradley v. Conway Springs Bottling Co.*,[25] under almost identical circumstances, the Kansas Supreme Court applied res ipsa, since, as the court said:

> The res ipsa loquitur doctrine is not limited to cases where the injurious agency is in the control of the defendant at the time of the injury, but it is sufficient that such agency was in defendant's control *at the time of the negligent act which caused the injury*.[26]

The plaintiff, by showing that no one besides defendant touched the bottle before the explosion, was entitled to the benefit of the doctrine. The applicability of the doctrine in cases of this particular nature is amply supported.[27]

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23. 181 S.W.2d 549 (Mo. App. 1944).
24. *Id.* at 551.
25. 154 Kan. 282, 118 P.2d 601 (1941).
26. Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 287, 118 P.2d 601, 604 (1941).
27. Hoffing v. Coca-Cola Bottling Co., 87 Cal. App.2d 371, 197 P.2d 56 (1948); Groves v. Fla. Coca-Cola Bottling Co., 40 So.2d 128 (Fla. 1949); Ortego *et al.* v. Nehi Bottling Wks., *et al.*, 199 La. 599, 6 So.2d 677 (1942); Macres v. Coca-Cola Bottling Co., 290 Mich. 567, 287 N.W. 922 (1939); Stevens v. Coca-Cola Bottling Co. of St. Louis, 215 S.W.2d 50 (Mo. App. 1948); Boykin v. Chase Bottling Wks., 222 S.W.2d 889 (Tenn. App. 1949); Joly v. Jones, 55 A.2d 181 (Vt. 1947).

(b) Where the plaintiff or others have handled the bottle after defendant has relinquished control and before the accident, plaintiff will be entitled to the benefit of a res ipsa instruction to the jury if he shows that no one aside from the defendant has *negligently mishandled* the bottle. The Arkansas Supreme Court has stated the majority rule clearly and concisely:

> When a plaintiff shows that an exploding bottle was handled with due care after it left the control of the defendant, and that the bottle had not been subject to extraneous harmful forces during that time, res ipsa loquitur applies.[28]

And in *Payne v. Rome Coca-Cola Bottling Co.*,[29] the Court of Appeals of Georgia said:

> When an action is brought to recover damages for an injury caused from the explosion of a bottle, the contents of which were manufactured, bottled, and sold by the defendant as a harmless beverage, an inference of negligence on the part of the manufacturer arises, when it is shown that all the persons through whose hands the bottle had passed were free from fault, and that the condition of the bottle and its contents had not been changed since it left defendant's possession.[30]

When the plaintiff or others have handled the bottle after it has left the control of the defendant, the plaintiff, in order to focus the inference of negligence upon the defendant, diverts the inference from himself or anyone else by showing that the bottle was at all times handled with reasonable care after the defendant gave up control. If the plaintiff does this successfully, the weight of authority allows him the benefit of the res ipsa doctrine.[31] Obviously, in those jurisdictions, if the facts show

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28. Coca-Cola Bottling Co. of Fort Smith, Ark. v. Hicks, 215 Ark. 803, 805, 223 S.W.2d 762, 764 (1949).

29. 10 Ga. App. 762, 73 S.E. 1087 (1912).

30. Payne v. Rome Coca-Cola Co., 10 Ga. App. 762, 73 S.E. 1087 (1912).

31. Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); McClelland v. Acme Brewing Co. *et al.*, 92 Cal. App.2d 698, 207 P.2d 591 (1949); Canada Dry Ginger Ale Co., Inc. v. Jochum, 43 A.2d 42 (D.C. App. 1945); Atlanta Coca-Cola Bottling Co. v. Danneman, 25 Ga. App. 43, 102 S.E. 542 (1920); Georgia-Alabama Coca-Cola Bottling Co. v. White, 55 Ga. App. 706, 191 S.E. 265 (1937); Mabee *et al.* v. Sutliff and Case, 335 Ill. App. 353, 82 N.E.2d 63 (1948); Auzenne v. Gulf Pub. Service Co., 188 So. 512 (La. App. 1939); Lanza v. DeRidder Coca-Cola Bottling Co., 3 So.2d 217 (La. App. 1941); Cole v. Pepsi-Cola Bottling Co., 15 So.2d 543 (La. App. 1941); Boucher v. La. Coca-Cola Bottling Co., 46 So.2d 701 (La. App. 1950); Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497 (1925); Counts v. Coca-Cola Bottling Co. of St. Louis, 149 S.W.2d 418 (Mo. App. 1941); Macon Coca-Cola Bottling Co. v. Crane, 211 N.C. 567, 190 S.E. 879 (1937); Fick v. Pilsener Brewing Co., 39 Ohio App. 158, 86 N.E.2d 616

that no one has handled the bottle at all after it left the defendant's control, it is not incumbent on plaintiff to negative mishandling. The facts themselves are such that no additional proof is necessary to focus the inference of negligence on the defendant.

Few cases hold that the doctrine of res ipsa loquitur is not applicable where plaintiff has focused the inference of negligence upon the defendant, either by merely proving the facts of the case (as discussed in [a]), or by affirmatively proving that no one besides defendant has been negligent (as discussed in [b]). Only one of these cases holds unequivocably that (1) res ipsa is inapplicable, and (2) therefore, plaintiff has failed to make out a prima facie case. In *Stodder v. Coca-Cola Bottling Plants,*[32] plaintiff was injured while opening a bottle of coke which exploded just after it was delivered by defendant. Plaintiff showed affirmatively that the bottle was not handled improperly after it left defendant's control. Refusing to apply the doctrine of res ipsa loquitur, the court in holding for defendant said:

> We hold that evidence of the breaking of a bottle, after the bottle has left the control of the defendant, and without proof of any other circumstances indicating failure on the part of the defendant to use due care, is not sufficient to make out a prima facie case of negligence.[33]

The court indicated that the plaintiff, in order to maintain his action, must show specific acts of negligence by the defendant.

A recent Missouri case has caused some difficulty. In *Maybach v. Falstaff Brewing Corp.,*[34] plaintiff was injured by the exploding of two bottles of defendant brewing corporation's beer while plaintiff was removing them from a shelf in a Kroger store. Plaintiff brought an action to recover for her injuries, joining the Brewing Company and Kroger's. Plaintiff proved that neither she nor anyone else *mishandled* the bottles after they passed out of the control of the Brewing Company. The

(1949); Winfree v. Coca-Cola Bottling Works, 20 Tenn. App. 615, 103 S.W.2d 33 (1937); Stroud v. Brands Punch Syrup Co. *et al.,* 205 S.W.2d 618 (Tex. Civ. App. 1947); Honea v. Coca-Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944); Berkendorfer *et al. v.* Garrett *et al.,* 143 S.W.2d 1020 (Tex. Civ. App. 1940).

32. 142 Me. 139, 48 A.2d 622 (1946).

33. Stodder v. Coca-Cola Bottling Plants, 142 Me. 139, 42 A.2d 622 (1946).

34. 359 Mo. 446, 222 S.W.2d 87 (1949).

Brewing Company appealed from an order sustaining plaintiff's motion for new trial as to the Brewing Company. The Supreme Court of Missouri affirmed the order granting a new trial. In so doing they rejected appellant's contention that plaintiff had to recover on the res ipsa theory or not at all, and that since this was not a proper case for the application of that doctrine, plaintiff must lose.

The courts agreed with appellant that this was not a res ipsa case. They said:

> It is generally held that the doctrine [res ipsa loquitur] is inapplicable unless the control or right (and duty) of control of the instrumentality causing the injury is in defendant *at the time of the injury,* although some cases hold that it is sufficient to prove that the instrumentality was in the possession and control of the defendant *at the time the negligent act was committed,* together with further proof of the absence of any cause intervening between the negligent act and the injury.[35]

In the course of the opinion, the court recognized that the rules laid down in two earlier Missouri cases[36] were in conflict with that laid down in the instant case. In those cases, said the court, the res ipsa doctrine was overextended in that it was held to be applicable if plaintiff could show exclusive control in defendant at the time of the negligent act plus no later mishandling by anyone. The court thought that it was essential to the application of the doctrine that the inference of negligence be directed toward the defendant by the facts of the accident alone, without any additional evidence of no mishandling later by other persons, and that requisite could be met only by a showing of defendant's exclusive control at the time of the accident.[37]

However, in answer to defendant's contention, *supra,* the court went on to say that the results in the earlier cases were correct, and, furthermore, that plaintiff had made out a prima facie case in the instant case. The reason given was that while lack of exclusive control in the defendant at the time of the accident negatives the use of the res ipsa doctrine, nevertheless

35. Maybach v. Falstaff Brewing Corp., 359 Mo. 466, 453, 222 S.W.2d 87, 89 (1949).

36. Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497 (1925); Counts v. Coca-Cola Bottling Co., 149 S.W.2d 418 (Mo. App. 1941).

37. Maybach v. Falstaff Brewing Corp., 359 Mo. 446, 452, 222 S.W.2d 87, 90 (1949).

in this type of case plaintiff may recover on a general negligence theory by the use of circumstantial evidence to prove, not specific acts of negligence, but general negligence. Apparently no proof of anything more than the facts of the accident plus the lack of mishandling by someone other than defendant is needed.[38]

It is thus manifest that whatever the theory, the results are the same. The court seems moved to lay down a somewhat broader principle of recovery, based on a willingness to go a long way toward letting a plaintiff prove his case by circumstantial evidence of general negligence only. That willingness is apparently due to two things (a) a realization that as a practical matter it is very likely that defendant was somehow at fault, and (b) that evidence of specific acts of neglience being peculiarly unavailable to the plaintiff, he could never recover for serious injuries for which the defendant probably ought to be responsible, without some help in proving his case. Thus the court says:

> Where, from the nature of the case, the plaintiff . . . could not be expected to know the exact causes of the precise negligent act which became the cause of the injury, and the facts were particularly within the knowledge of the defendant, the plaintiff is not required to allege the particular cause. . . . Under the circumstances of this case, the facts concerning the manufacture of the beer and the inspection and charging of the bottles being peculiarly within the knowledge of the defendant, we think the petition charges general negligence with as much particularity as should be expected.[39]

Returning once more to those cases which refuse to apply res ipsa loquitur in spite of plaintiff's having negatived negligence by himeslf or anyone besides defendant, the remaining cases seem to be distinguishable from those arbitrarily refusing to apply the doctrine. In *Curley v. Ruppert*,[40] where defendant delivered cases of beer to plaintiff's store, and no one touched them until one bottle exploded, certainly no one mishandled the bottle in question after it left the defendant's control. The New York Court of Appeals refused to apply res ipsa. However, it was shown that the bottle had been at plaintiff's store for

38. *Id.* at 456, 222 S.W.2d at 92.
39. *Ibid.*
40. 272 App. Div. 441, 71 N.Y. Supp. 578 (1st Dep't. 1947).

three days. Also it was shown that fragments of the bottle had been retained by plaintiff, but that plaintiff had done nothing to have these fragments analyzed to ascertain whether or not the bottle was defective. The court felt that since plaintiff might well have had the opportunity to prove specific acts of negligence by defendant, plaintiff should not be allowed to reap the benefits of res ipsa. This is a further indication that relative accessibility of evidence may play a more important part in determining the applicability of the doctrine than is ordinarily thought to be the case. In other cases courts have not arbitrarily held res ipsa inapplicable, but have shown that the plaintiff had sufficiently proved specific acts of negligence.[41]

It may be safely assumed then, that where the plaintiff has satisfied the court that neither he nor anyone else has done anything to change the condition of the bottle after it has left the defendant's control and up to the time of the explosion, the great majority of the courts allow the plaintiff the benefit of the doctrine of res ipsa loquitur. This rule applies where the explosion occurs immediately after the bottle leaves defendant's control (in which case plaintiff need not show affirmative evidence of absence of contributory negligence, since the facts speak for themselves); the rule applies equally as well where the bottle has been handled by persons other than defendant, but where plaintiff has shown by affirmative proof that no one mishandled the bottles.

3. It now becomes necessary to examine those cases where the plaintiff merely proves the facts of the accident, and, without affirmatively showing that neither he nor anyone else did anything to cause the explosion, relies on the doctrine of res ipsa. As might be expected in the light of the previous discussion the majority of the courts hold the doctrine inapplicable in a case of this type. The rule is well stated in *Canada Dry Ginger Ale, Inc. v. Fisher*:[42]

41. In Coylar v. Little Rock Bottling Works, 114 Ark. 140, 169 S.W. 810 (1914), where plaintiff showed that on numerous former occasions defendant had overcharged bottles, *held*, this evidence was sufficient to send the case to the jury on the question of general negligence. And in Naumann v. Wekle Brewing Co., 127 Conn. 44, 15 A.2d 181 (1940), where plaintiff showed bottle was defective, *held*, this evidence, along with evidence that no one mishandled the bottle after it left defendant's possession and control, was sufficient to sustain a cause of action for general negligence.

42. 201 P.2d 245 (Okla. 1948).

> The doctrine of 'res ipsa loquitur' is inapplicable to the bursting of a bottle of carbonated beverage after it has passed from the bottler into the hands of third parties, where the record is silent as to how the beverage was handled after it leaves the possession of the bottler until received by the retailer.[43]

In the *Canada Dry* case, defendant delivered bottles of its sparkling water to plaintiff, and six months later, when plaintiff attempted to pick up one of the bottles, it exploded, lacerating plaintiff's arm. Plaintiff sued, relying wholly upon res ipsa. The court denied recovery, saying that while the accident may well have been attributed to the negligence of someone, plaintiff had not sufficiently focused negligence upon the defendant.

In *Roper v. Dad's Root Beer Co.*,[44] plaintiff was a customer in a self-service market. While he was walking by a counter where bottles of defendant's root beer were standing, one of the bottles exploded and injured plaintiff. When plaintiff's case reached the Illinois intermediate appellate courts it was held that res ipsa could be applied where the instrumentality causing the accident was out of the possession and control of the defendant, so long as the defendant had possession and control of it at the time the negligent act was committed. However, the court said that in order to fix negligence, if any, upon defendant in such a case,

> It is a condition precedent to recovery that plaintiff shows affirmatively that there was no intervening negligence in the handling of the beverage after it left the control and management of the manufacturer. . . . No case has been brought to our attention in which recovery has been allowed upon mere proof of an explosion.[45]

Since the plaintiff in the *Roper* case did not negative negligence by herself or anyone else besides defendant, she was denied the benefit of res ipsa, and since she alleged no specific acts of negligence she was denied recovery. Since the plaintiff was completely innocent, the result may be thought to be harsh. However, it must be remembered that any one of several persons could have negligently mishandled the bottle after it left de-

43. Canada Dry Ginger Ale, Inc. v. Fischer, 201 P.2d 245 (Okla. 1948).
44. 336 Ill. App. 91, 82 N.E.2d 815 (1948).
45. Roper v. Dad's Root Beer Co., 336 Ill. App. 91, 95, 82 N.E.2d 815, 816 (1948).

fendant's control. Certainly the *Roper* case represents the great weight of authority.[46]

4. Where the accident occurs after the defendant has relinquished control of the bottle, and where there is evidence that the plaintiff, or some third party, has mistreated or changed the condition of the bottle, res ipsa loquitur will not be applied. Thus, where defendant showed by expert testimony by one of the world's outstanding chemists on glass that the bottle which exploded had been jarred and fractured before the explosion, res ipsa was not applicable.[47] The same result has been reached where it was shown that a child had mishandled an unopened bottle,[48] where the plaintiff had left the bottle in the trunk of his car and driven thirty miles over rough roads,[49] and where the plaintiff admitted having tipped over the bottle by accident.[50]

D. EFFECT OF THE FACT THAT EVIDENCE OF THE TRUE CAUSE OF THE ACCIDENT IS MORE READILY ACCESSIBLE TO THE DEFENDANT THAN TO THE PLAINTIFF.

This requisite to the application of res ipsa loquitur has not been recognized by all the courts which apply the doctrine. Prosser has severely criticized its use as ever being a controlling factor in denying the plaintiff the benefit of the doctrne, because if the circumstances of the accident are such as to create a reasonable inference of negligence, "it cannot be supposed that the inference ever would be defeated by a showing that the defendant knew nothing about what happened."[51] He further points

46. Stewart *et al.* v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60, 68 P.2d 952 (1937); Gerber v. Faber *et al.*, 54 Cal. App.2d 674, 129 P.2d 485 (1942); Berkens v. Denver Coca-Cola Bottling Co., 109 Colo. 840, 122 P.2d 884 (1942); Slack v. Premier-Pabst Corp., 5 A.2d 516 (Del. Super. 1939); Hughs v. Miami Coca-Cola Bottling Co., 155 Fla. 299, 19 So.2d 862 (1944); Piacun v. La. Coca-Cola Bottling Co. *et al.*, 33 So.2d 421 (La. App. 1947); Kees v. Canada Dry Ginger Ale, Inc., 239 Mo. App. 1080, 199 S.W.2d 76 (1947); Luciano v. John Morgan, Inc., 267 App. Div. 785, 45 N.Y. Supp.2d 502 (2d Dep't 1943); Dail v. Taylor, 151 N.C. 284, 66 S.E. 135 (1909); Canada Dry Ginger Ale, Inc. v. Fischer, 201 Okla. 81, 201 P.2d 245 (1948); Soter v. Griesedieck Western Brewing Co., 200 Okla. 302, 193 P.2d 575 (1948).

47. Palmer v. Hygrade Water and Soda Co., *et al.*, 236 Mo. App.247, 151 S.W.2d 548 (1941).

48. Hennings v. Thompson, 45 So.2d 755 (Fla. 1950); Loebig's Guardian v. Coca-Cola Bottling Co., 259 Ky. 124, 81 S.W.2d 910 (1935).

49. Dunn v. Hoffman Beverage Co., 126 N.J.L. 556, 20 A.2d 352 (1941).

50. Sweeney v. Blue Anchorage Beverage Co., 325 Pa. 216, 189 Atl. 331 (1937).

51. PROSSER, *op. cit. supra* note 1, at 301.

out that if the facts of the accident do not give rise to an inference of negligence, a plaintiff certainly could not gain invocation by the court of the doctrine by showing that he knew less about the accident than did his adversary.

Be this as it may, in bursting bottle cases the courts have put some weight on the fact that in most instances the defendant is in a better position to explain the true cause of the accident than is the plaintiff. That fact in and of itself does not often give rise to an application of res ipsa, but, when coupled with fulfillment of the other requisites, the courts offer it as a reason for the existence of the doctrine. Thus, in *Stolle v. Anheuser Busch, Inc.*, where plaintiff showed the explosion of a bottle of beer, the resulting injury, and proof that no one besides defedant had been negligent, the Supreme Court of Missouri stated that applying res ipsa "is fair to the manufacturer, and will afford the cusomers . . . reasonable protection, while a contrary rule leaves them practically without redress,"[52] since plaintiff would have a very difficult time proving specific acts of negligence, due to the fact that defendant, and only defendant, has knowledge of the facts which might explain the accident. In *Stephens v. Coca-Cola Bottling Co.*,[53] the court, in discussing res ipsa, declared:

> In a res ipsa loquitur case, owing to the fact that such accidents as the one involved herein ordinarily do not occur without negligence of defendant, *and because the proof is more accessible to defendant,* plaintiff, in order to make out a prima facie case, need only show generally that he was injured as a result of some negligence of defendant, without pleading and proving what particular or specific negligence it was that caused the injury.[54]

These two cases suggest that the fact that the explanation of the cause of the accident is more accessible to defendant than to

52. 307 Mo. 520, 271 S.W. 497, 500 (1925). Actually the theory of this case, in allowing an application of res ipsa loquitur, has been overruled by a later Missouri decision. [Maybach v. Falstaff Brewing Corp., 359 Mo. 446, 222 S.W.2d 87 (1947)]. However, the *Maybach* case allowed recovery where the facts were essentially the same as they are here, such recovery being allowed on the theory of an action for general negligence rather than on res ipsa grounds. The *Stolle* case represents the weight of authority.

53. 215 S.W.2d 50 (Mo. App. 1948). The discussion included in note 52 *supra* applies to this case also.

54. Stephens v. Coca-Cola Bottling Co. of St. Louis, 215 S.W. 50 (Mo. App. 1948).

plaintiff, is *not a conditian precedent* to the invocation of the doctrine, but rather an explanation of the policy underlying the doctrine.[55] Other cases support this view.[56]

IV. Effect of Similar Accidents Involving Defendant's Product

Discussion thus far has been restricted primarily to cases involving an isolated explosion of a single bottle of carbonated beverage. Is the fact that other bottles of defendant's product have exploded a factor to be considered? The answer to this question must be in the affirmative. In general, when plaintiff offers evidence of the explosion of other bottles containing defendant's product, an inference of negligence arises sufficient to take the case to the jury.

The Court of Appeals of Tenessee, in *Boykin v. Chase Bottling Works*,[57] has handed down an exceptionally well written opinion in a case involving the effect of evidence of the explosion of other bottles containing defendant's product. The facts of the *Boykin* case may be summarized as follows: Defendant delivered its product, Double-Cola, to plaintiff's place of business on a Wednesday. After that time and before the bottle exploded on the following Sunday, an ice man placed a 50 lb. block of ice on top of the bottles. It was also shown that adult customers were allowed to remove bottles from the cooler. On the following Sunday, a customer having asked for a bottle of defendant's product, plaintiff removed the bottle, and it exploded in her hand, causing a severe injury to her hand and wrist. At the trial plaintiff testified generally that she and and all others who handled the bottle were careful. In the first count of her declaration, plaintiff had alleged a specific act of negligence

55. In Curley v. Ruppert, 272 App. Div. 441, 71 N.Y. S.2d 578 (1st Dep't 1948), plaintiff proved sufficient facts to be entitled to benefit of res ipsa loquitur by the majority rule, but was refused benefit of the doctrine on the ground that evidence as to the true cause of the accident was in his possession rather than that of the defendant, *i.e.*, plaintiff had fragments of the broken bottle, and the court said that plaintiff should have had these analyzed to ascertain whether the bottle was defective; since the plaintiff failed to avail himself of this opportunity, he was denied the benefit of res ipsa.

56. Ortego *et al.* v. Nehi Bottle Works *et al.*, 199 La. 599, 6 So.2d 677 (1942); Lanza v. De Ridder Coca-Cola Bottling Co., 3 So.2d 217 (La. App. 1941); Auzenne v. Gulf Pub. Service Co., 188 So. 512 (La App. 1939); Seven-Up Bottling Co., Inc. v. Gretes, 182 Va. 138, 27 S.E.2d 925 (1943); Joly v. Jones, 55 A.2d 181 (Vt. 1947).

57. 222 S.W.2d 889 (Tenn. App. 1949).

(overcharging of bottles), and in addition sought recovery under the res ipsa loquitur doctrine. In the second count, she reiterated the averments of the first count, and charged, in addition, another specific act of negligence, *i.e.*, that defendant used defective bottles. On count number one, the case was sent to the injury, which found for the defendant; on count number two, the court directed a verdict for the defendant. This judgment was affirmed on appeal.

The Tennessee court pointed out that the fact that plaintiff alleged a specific act of negligence on the part of defendant did not in and of itself deny plaintiff the benefit of the doctrine of res ipsa loquitur. The court went on to say that while res ipsa was formerly held inapplicable to cases involving bursting bottles, the weight of authority now holds the doctrine applicable where negligent handling of the bottle by everyone besides defendant has been negatived. However, in the *Boykin* case, plaintiff's testimony on this point was vague and unsatisfactory. The court further pointed out that the mere explosion of a bottle and an injury is not sufficient to give rise to an application of the doctrine. However, said the court:

> When, in addition to circumstances attending the injury, it is shown that other bottles filled and marketed by the same bottler under substantially the same conditions exploded, and such occurrences are not too remote in point of time, it is held that a prima facie case of liability is made out, requiring the issue of defendant's negligence to be submitted to the jury.[58]

The court pointed out that courts so holding do so, not on the ground that a res ipsa case has been made out, but rather on the ground that in such cases the circumstances immediately connected with the injury are considered along with other circumstances pertinent to the issue in order to ascertain whether, when all taken together, they are sufficient in probative value to make a question for the jury.[59]

Many courts make the statement that the basis for applying the res ipsa doctrine is the fact of the injury itself. But the court in the *Boykin* case points out that the basis should be the circumstances immediately attending the injury. In that case not only were the circumstances immediately attending the

58. *Id.* at 894.
59. *Ibid.*

injury shown, but, in addition, the explosion of other bottles was offered in evidence. The court held that this evidence could be sufficient in probative value to furnish a basis for an inference of negligence. If so, the jury may, or may not draw the inference. And if they do, they may consider it along with all the other evidence, in determining where the preponderance lies.

Thus, says the Tennessee court, in determining the probative value of the particular circumstances in a particular case, the circumstances should be tested *by the principles* of the res ipsa doctrine without regard to whether that doctrine is applied *eo nominee.*

The *Boykin* case, then, seems to agree with Prosser's view that the res ipsa doctrine is merely a label used to describe one kind of circumstantial evidence case, and that there are varying degrees of circumstantial evidence, some of which do not fall exactly within the limits of the res ipsa doctrine, and others which do. Thus, where plaintiff merely shows that a bottle exploded and that he was injured thereby, this evidence alone will not entitle him to the benefit of the doctrine. If the plaintiff goes further and establishes that from the time the defendant relinquished control until the time of the injury no one mishandled the bottle, he will normally be allowed the benefit of the doctrine. But when paintiff shows in addition to the proof set out above, that other bottles of defendant's product exploded under substantially the same conditions and not too remotely in point of time, plaintiff normally will not *need* the benefit of res ipsa, and, as pointed out in the *Boykin* case, he has shown enough to take the case to the jury irrespective of the rule of res ipsa. This is not a difference in kind but rather in degree. It is not that a straight circumstantial evidence case is a different *kind* of case from a res ipsa loquitur case. It is only that there are *more* circumstances there than in the strict res ipsa situation. It would seem that the only basis for the application of res ipsa as a separate doctrine, at least by those courts which recognize that res ipsa is a form of circumstantial evidence, is the feeling of a need to justify allowing the jury to draw an inference where the circumstances do not indicate the likelihood of the inference so clearly, or at least so directly, as they usually must.

Other cases support this reasoning. Thus, in *Merchant v. Columbia Coca-Cola Bottling Co.*,[60] where plaintiff was injured by the explosion of a bottle of defendant's products, it was held that evidence of the explosion of other bottles charged and distributed by the same bottler at about the same time was sufficient to send the case to the jury on the issue of defendant's negligence.[61] And where more than one bottle of a group explodes at substantially the same time, this is generally held to be an even stronger case of circumstantial evidence, and such a case is usually submitted to the jury without reference to the res ipsa doctrine. So in *Coca-Cola Bottling Works v. Shelton*,[62] where twenty-seven bottles of defendant's product exploded in one place on a particular afternoon, this evidence was held to make out a prima facie case of negligence on the part of the defendant. This view is amply supported.[63]

It seems evident then, that circumstantial evidence appears in varying degrees, sometimes insufficient to merit an application of res ipsa, sometimes sufficient for its application, and sometimes determinative enough so that such evidence alone makes out a prima facie case of negligence against the defendant, without the necessity of an application of the doctrine.

V. Procedural Effect of Res Ipsa Loquitur in Bursting Bottle Cases

Once the plaintiff has shown himself entitled to the benefit of the application of the doctrine of res ipsa loquitur, the question arises as to how strong a case it affords the plaintiff.

The majority of American courts hold that res ipsa furnishes an inference of negligence against the defendant.[64] A res ipsa

60. 214 S.C. 206, 51 S.E.2d 749 (1949).

61. *See* Davis v. Coca-Cola Bottling Co. of Asheville, 228 N.C. 32, 44 S.E.2d 337 (1947); Ashkenazi v. Nehi Bottling Co., 217 N.C. 552, 8 S.E.2d 818 (1940); Dail v. Taylor, 151 N.C. 284, 66 S.E. 135 (1909).

62. 214 Ky. 118, 282 S.W. 778 (1926).

63. Merchant v. Columbia Coca-Cola Bottling Co., 214 S.C. 206, 51 S.E.2d 749 (1949); Graham *et al.* v. Cloar, 30 Tenn. App. 306, 205 S.W.2d 764 (1947); Stroud v. Brands Punch Syrup Co. *et al.*, 205 S.W.2d 618 (Tex. Civ. App. 1947).

64. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522 (1949); Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); Honea v. City Dairy, Inc., 22 Cal.2d 614, 140 P.2d 369 (1943); Canada Dry Ginger Ale Co., Inc. v. Jochum, 43 A.2d 42 (D.C. App. 1945); Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 (1941); Coca-Cola Bottling Co. v. Shelton, 214 Ky. 118, 282 S.W. 778 (1926); Cole v. Pepsi-Cola Bottling Co., 15 So.2d 543 (La. App. 1941); Ruffin v. Coca-Cola

instruction to the jury following the majority rule points out that both the burden of persuasion and the burden of producing evidence remain with the plaintiff; that from the evidence the jury may infer that defendant was negligent; that this inference is a permissive, not a mandatory one; that the inference, though established, may be rebutted by the defendant. Thus in *Counts v. Coca-Cola Bottling Co. of St. Louis,* where the plaintiff showed himself entitled to a res ipsa instruction, an instruction to the effect that the jury was "at liberty to infer that defendant was negligent" was sustained on appeal.[65]

Very few courts treat the res ipsa doctrine as giving rise to a presumption, requiring a directed verdict for plaintiff unless defendant rebuts it, which would in effect shift the burden of producing evidence to defendant.[66] In *Lanza v. De Ridder Coca-Cola Bottling Co.*,[67] the court said:

> Under our law, in the opinion of this court, when the plaintiff has thus proved that the bottle of Coca-Cola had not been opened or tempered with or improperly handled from the time it left the possession of the defendant company until the time it exploded in the hand of the plaintiff while she was in the act of lifting the bottle from the ice box to hand to a customer, through no negligence on her part, then a prima facie case has been established and the burden is then on the defendant company, under the doctrine of res ipsa loquitur, to rebut the presumption that the explosion arose from some defect or some negligence in its manufacture and preparation.[68]

Even in those jurisdictions where an invocation of the res ipsa rule results in a rebuttable presumption shifting the burden

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Bottling Co., 311 Mass. 514, 42 N.E.2d 259 (1942); Maybach v. Falstaff Brewing Corp., 359 Mo. 446, 222 S.W.2d 87 (1949); Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497 (1925); Kees v. Canada Dry Ginger Ale Co., Inc., 239 Mo. App. 1080, 199 S.W.2d 76 (1947); Brunskill v. Farabi, 181 S.W.2d 549 (Mo. App. 1944); Palmer v. Hygrade Water & Soda Co., 236 Mo. App. 247, 151 S.W.2d 548 (1941); Markowitz v. Liebert and Obert, 23 N.J. Misc. 281, 43 A.2d 794 (Sup. Ct. 1945); Macon Coca-Cola Bottling Co. v. Crane, 211 N.C. 567, 190 S.E. 879 (1937); Fick v. Pilsener Brewing Co., 39 Ohio App. 158, 86 N.E.2d 616 (1949); Boykin v. Chase Bottling Works, 222 S.W.2d 889 (Tenn. App. 1949); Winfree v. Coca-Cola Bottling Works, 20 Tenn. App. 615, 103 S.W.2d 33 (1937); Honea v. Coca-Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944); Berkendorfer *et al.* v. Garrett *et al.*, 143 S.W.2d 1020 (Tex. Civ. App. 1940).

65. 149 S.W.2d 418 (Mo. App. 1941).

66. Piacun v. La. Coca-Cola Bottling Co., 33 So.2d 421 (La. App. 1947); Alagood v. Coca-Cola Bottling Co., 135 S.W.2d 1056 (Tex. Civ. App. 1940).

67. 3 So.2d 217 (La. App. 1941).

68. *Id.* at 219.

of producing evidence to the defendant, no court has gone any further, and the defendant always has an opportunity to rebut the presumption against him.

VI. Conclusion

The rules generally applicable in other res ipsa cases apply as well in cases involving injuries sustained through the bursting of a bottle. Several generalizations may be fairly made.

A. The courts regard the explosion of a bottle as an accident normally the result of negligence on the part of someone.

B. Most bottles burst after the defendant bottler has relinquished control over and possession of the bottle. Thus, in order to focus the inference of negligence on the defendant, the plaintiff must show that neither he, nor anyone else, negligently handled the bottle after it left the defendant's control. If he is unable to do so, he will not get the benefit of the doctrine.

C. The fact that the evidence of the true cause of the accident is more readily accessible to the defendant than to the plaintiff may be said to be an explanation of the necessity for such a doctrine rather than a condition precedent to its application.

D. Where the plaintiff shows that other bottles of the defendant have exploded, with further proof that those explosions happened at approximately the same time and under substantially the same conditions as the accident complained of, the courts have held that plaintiff has made out a cause of action for general negligence and that application of the res ipsa doctrine is unnecessary. It would seem, however, that there is no difference in kind between the two types of cases, since res ipsa is itself only a special application of the rules of circumstantial evidence.

E. As in other cases where the doctrine is applied, res ipsa results in a permissive, not a mandatory, inference of negligence. Both the burden of producing evidence and the burden of persuasion are thought by most courts to remain with the plaintiff, although a few courts would direct a verdict for the plaintiff if he makes out a res ipsa case and defendant introduces no evidence.

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